

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN CONNER SERRY,

Appellant.

No. 33673-1-II

UNPUBLISHED OPINION

HOUGHTON, J. -- Justin Conner Serry appeals his conviction of second degree assault while armed with a deadly weapon and against a family or household member. He argues that the trial court made evidentiary errors. Pro se, he argues that insufficient evidence supports his conviction. We affirm.

FACTS

In the early spring 2005, Serry lived in a three bedroom house in Kingston that he shared with three roommates, including Dustin McClure and Steven White. Serry and McClure shared a room in the house, and White occupied a room down the hall. Serry admits that while he lived at the Kingston home he established a romantic relationship with a 14-year-old girl, A.A. McClure and White were both aware of Serry's romantic relationship with A.A.

Based on Serry's interactions with A.A., McClure and White began to suspect that Serry

was having sexual intercourse with her. On April 8, McClure reported to a Kitsap County sheriff's deputy that he believed Serry was having sexual intercourse with a minor. The sheriff's deputy forwarded McClure's report to Detective Gundrum.

On April 14, Gundrum called A.A.'s mother to tell her that Serry's roommates reported he was having sexual intercourse with A.A. Gundrum then called Serry, who was driving to the Kingston home. Serry requested that Gundrum call him back in 10 minutes because he was busy. After Gundrum called Serry, A.A.'s mother called Serry to report his roommates' allegations to the sheriff's department regarding A.A. Once home, Serry confronted his roommates about the allegations.

According to White, Serry came to his bedroom door on the morning of April 14, pounded on the door, and said, "Get up." II Report of Proceedings (RP) at 171. White went to his door, opened it halfway across his body, and put his head through the opening. White recalls Serry standing outside his door three and one-half to four feet away from him with his forearm extended holding a knife. Serry asked White if he "ratted" him out to the police. II RP at 174. White denied speaking to the police and shut his door.

McClure testified that on the morning of April 14, he heard a noise in the hallway that sounded like someone banging on a door. McClure stated he later awoke to Serry's knee on his bed, his hand on his shoulder, and Serry holding a knife four to five inches from his throat. Serry asked McClure if he "ratted" him out to the police. McClure denied speaking to the police.

Later on the morning of April 14, a sheriff's deputy arrested Serry for assault. Serry had two knives on him at the time of arrest.

The State charged Serry with three counts of third degree child rape and two counts of

second degree assault (one count involving McClure and the other involving White). The assault counts also carried special allegations that Serry committed the crimes while armed with a deadly weapon and against a family or household member. Serry's jury trial began on July 5, 2005.

The morning before he testified, Serry prepared a hand-drawn, not-to-scale diagram of the stairs leading up to the second floor of the Kingston home and the bedrooms on that floor. He drew the floor plan to the "best of [his] artistic ability." III RP at 271. He had not been to the Kingston home in nearly three months. Defense counsel had the diagram marked as exhibit 11. Serry also offered eight photos¹ of the Kingston home, and the trial court admitted them without objection.

Serry referred to exhibit 11 as he testified to the layout of the Kingston home and the events that occurred on the morning of April 14. He labeled the exhibit with each roommate's first initial to denote which room each roommate occupied. He also marked the exhibit to show the direction White's door opened and to show where he stood in the hall when speaking with White. Serry did not make any additional marks on the exhibit.

Serry also testified that during the early spring 2005, he heard that McClure attempted to rape A.A and that McClure allegedly admitted to having consensual sexual intercourse with her. A.A. also testified that McClure attempted to rape her and had made unwanted sexual advances toward her.

After the conclusion of Serry's testimony, defense counsel moved to admit exhibit 11.

¹ Exhibit 3: photo of staircase from base of stairs; exhibit 4: photo of inside of White's bedroom; exhibit 5: photo of third roommate's bedroom; exhibit 6: photo of Serry and McClure's bedroom; exhibit 7: photo of downstairs common room; exhibit 8: photo of computer room to the right of the stairs looking from front door; exhibit 9: photo of kitchen; exhibit 10: photo of White's bedroom from bedroom door.

Defense counsel stated Serry used the drawing during his testimony to assist the jury, but admitted, “It’s already been conceded it’s not anything close to scale, it was just used to assist the jury in lining up where everyone was in the home.” III RP at 306.

The State did not object to the trial court admitting the drawing as illustrative evidence, but asked that the trial court not send it to the jury room for deliberations. The trial court reserved ruling on the issue. The following morning, the trial court asked if there was any additional argument on the issue. Serry demurred. The trial court admitted exhibit 11 as illustrative evidence, but said it would not send it to the jury room.

During deliberations, the jury submitted two questions to the trial court. One asked if there was a written confession, and one inquired, “The photographic evidence is unlabeled. Can we get a transcript of the testimony describing them?” Clerk’s Papers (CP) at 46.

In response to the question regarding the photographic evidence, defense counsel asked the court to give the jury exhibit 11 or to reproduce the testimony of Serry describing the exhibits. The trial court denied defense counsel’s requests and submitted the same answer to both questions, “The jury has all of the evidence that is admitted.” CP at 46, 47.

The jury found Serry not guilty of the three third degree child rape counts and not guilty of the second degree assault count involving White. But the jury found Serry guilty of one count of second degree assault for the assault count involving McClure and found that he committed the assault against a family or household member and while armed with a deadly weapon Serry appeals.

ANALYSIS

Exhibit 11 and Serry’s Testimony

Serry first contends that the trial court abused its discretion by refusing to (1) admit exhibit 11 as substantive evidence, (2) send exhibit 11 to the jury during deliberations, and (3) send exhibit 11 or a transcript of his testimony to the jury in response to the jury's question during deliberations.

We leave decisions regarding the admission of exhibits as evidence to the sound discretion of the trial court and will not disturb them on review absent a showing of abuse of discretion. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *Castellanos*, 132 Wn.2d at 97.

Serry argues that the trial court abused its discretion when it declined to admit exhibit 11 as substantive evidence, but rather admitted it as illustrative evidence. Because Serry did not lay the necessary foundation to admit the exhibit as substantive evidence, we disagree.

A trial court should not allow an exhibit specially prepared for trial in as substantive independent evidence unless there is preliminary testimony, by one who can be cross-examined, as to the accuracy of the data on which the presenting party is basing the exhibit. *Owens v. City of Seattle*, 49 Wn.2d 187, 194, 299 P.2d 560 (1956); 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 402.24, at 286 (4th ed. 1999). Further, the trial court should not receive into substantive evidence exhibits lacking proof of the correctness of the representation. *Owens*, 49 Wn.2d at 194.

On the other hand, our Supreme Court favors the use of illustrative evidence and gives the trial court wide latitude in determining whether to admit illustrative evidence. *State v. Lord*, 117 Wn.2d 829, 855, 822 P.2d 177 (1991). An appropriate illustrative piece of evidence aids the fact

finder in understanding other evidence where the fact finder knows the limits on the accuracy of the evidence. *Lord*, 117 Wn.2d at 855. A diagram offered in evidence for purely illustrative purposes must be relevant and material in character to the ultimate fact the presenting party seeks to demonstrate by its use and, additionally, must have the support of proof showing such evidence to be substantially similar to the real thing. *State v. Gray*, 64 Wn.2d 979, 983, 395 P.2d 490 (1964). The foundation requirement for illustrative material is less onerous than the foundation requirement for other exhibits. *See Matsushita Elec. Corp. of Am. v. Salopek*, 57 Wn. App. 242, 248-49, 787 P.2d 963 (1990); Tegland, *supra*, § 402.36, at 316.

Serry introduced exhibit 11, a hand-drawn diagram of the Kingston home he produced to the “best of [his] artistic ability.” III RP at 271. The diagram was concededly “not anything close” to scale, and he introduced it “to assist the jury in lining up where everyone was in the home.” III RP at 306. He did not present testimony that established exhibit 11 as an accurate representation of the Kingston home, but rather admitted its inaccuracy.

Additionally, he did not show that he intended to use the exhibit as more than an illustrative diagram to assist the jury in understanding the layout of the home. On appeal, he does not present an argument as to the accuracy of exhibit 11, nor does he mention a reason that would have prompted the trial court to admit the exhibit as substantive evidence. The trial court did not abuse its discretion in declining to admit exhibit 11 as substantive evidence.²

² Additionally, error in the admission of evidence is without prejudice when other evidence establishes the same facts. *Feldmiller v. Olson*, 75 Wn.2d 322, 325, 450 P.2d 816 (1969). Here, Serry testified about the layout of the Kingston home, and he submitted eight photographs of the home’s interior as evidence. Therefore, any error concerning the admission of exhibit 11 was without prejudice because he established the layout of the home through his testimony and photographic evidence.

Serry next contends that the trial court abused its discretion by refusing to send exhibit 11 to the jury during deliberations.

Our Supreme Court has stated that illustrative evidence should not go to the jury room. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 426-27, 114 P.3d 607 (2005). Instead, a court should allow use of illustrative exhibits only during the initial presentation of testimony and/or in final argument by counsel. *Woods*, 154 Wn.2d at 427.

As analyzed above, the trial court correctly admitted exhibit 11 as illustrative, not substantive evidence. Based on the approach our Supreme Court has adopted for presenting illustrative evidence to a jury, the trial court acted within its discretion by refusing to allow exhibit 11 to go to the jury room during deliberations.

Serry further asserts that the trial court abused its discretion when it refused to send either exhibit 11 or a transcript of Serry's testimony to the jury in response to its questions.

While the jury was deliberating, it posed two questions to the trial court, including one which stated, "The photographic evidence is unlabeled. Can we get a transcript of the testimony describing them?" CP at 46. The trial court responded, "The jury has all of the evidence that is admitted." CP at 46, 47. Serry contends that the trial court abused its discretion by refusing to submit exhibit 11 or a copy of his testimony to the jury in response to this question.

CrR 6.15(f)(1) discusses the procedure for a trial court receiving questions from a jury during deliberations. It provides in pertinent part:

In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence.

CrR 6.15(f)(1).

As discussed above, our Supreme Court disfavors allowing illustrative evidence to go to a jury while it is deliberating. *Woods*, 154 Wn.2d at 427. The trial court has discretion in responding to a jury's request. CrR 6.15(f)(1). Here again, the trial court followed our Supreme Court's guidance and properly refused to send illustrative evidence to the jury during deliberations. Therefore, the trial court did not abuse its discretion.

Serry also argues that the trial court should have submitted a transcript of his testimony about the exhibit in answering the jury's question. We disagree.

A trial court has discretion to permit a jury to review witness testimony during its deliberations. *State v. Monroe*, 107 Wn. App. 637, 638, 27 P.3d 1249 (2001). But the concern that such a review does not unduly emphasize any portion of the testimony circumscribes that discretion. *Monroe*, 107 Wn. App. at 638. A trial court must weigh whether a jury should reread transcripts depending on the particular facts and circumstances of the case against the danger that the jury “may place undue emphasis on testimony considered a second time at such a late stage of the trial.” *State v. Koontz*, 145 Wn.2d 650, 654, 41 P.3d 475 (2002) (quoting *United States v. Montgomery*, 150 F.3d 983, 999 (9th Cir. 1998)) (internal quotation marks omitted); *Monroe*, 107 Wn. App. at 638. Further, because a jury must remain impartial as it determines the facts, our Supreme Court disfavors reading back testimony during deliberations. *Koontz*, 145 Wn.2d at 654.

Serry's main argument seems to be that he could have submitted a transcript of his testimony to the jury without the jury placing any undue emphasis on it. But nothing obligated the trial court to submit the transcript to the jury. Additionally, the trial court made its decision in

light of the fact that Washington courts disfavor the practice of rereading testimony to a jury during deliberations. His evidentiary arguments fail.

Sufficiency of the Evidence

In his Statement of Additional Grounds (SAG), RAP 10.10, Serry argues that insufficient evidence proves he committed second degree assault. SAG at 1. He supports his claim by stating that McClure had a motive to testify falsely based on his alleged attempted rape and unwanted sexual advances toward A.A. SAG at 1.

We consider evidence sufficient to support a conviction if, when viewed in the light most favorable to the State, it allows any reasonable person to find each element of a crime beyond a reasonable doubt. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). An insufficiency claim admits the truth of the State's evidence and any reasonable inferences from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We leave resolution of conflicting testimony, credibility determinations, and the persuasiveness of evidence to the fact finder and do not review them on appeal. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

To convict Serry of second degree assault, the State had to prove, beyond a reasonable doubt, that he assaulted another with a deadly weapon. RCW 9A.36.021(1)(c). An "assault" occurs when a person places another in apprehension of harm regardless of whether the actor intends to inflict or is capable of inflicting that harm. *State v. Hupe*, 50 Wn. App. 277, 282, 748 P.2d 263 (1988).

McClure testified that Serry confronted him with a knife in a hostile manner. The jury apparently believed McClure and not Serry. Therefore, taking the evidence in a light most favorable to the State, the jury had sufficient evidence to conclude beyond a reasonable doubt that

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Serry assaulted McClure.

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Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, J.

We concur:

Quinn-Brintnall, C.J.

Van Deren, J.